

SUPREME COURT OF WISCONSIN
OFFICE OF LAWYER REGULATION

Public Reprimand With Consent

2005-OLR-9

Ross R. Kinney
Attorney at Law

The Respondent, Ross R. Kinney, 67, practiced in Waukesha, Wisconsin. This reprimand is based on the following conduct.

Attorney Kinney graduated from the University of Chicago Law School in 1963 and was admitted to the Wisconsin Bar in 1967. From 1967 to 1995, he was a member and partner in the Quarles & Brady law firm, where he practiced in litigation, particularly in product liability matters involving personal injury or commercial loss. While at Quarles & Brady, he did not represent clients in divorce matters. Since 1996, he has been a sole practitioner, during which time he has represented 10 to 15 clients in divorce matters. None of these matters, prior to the one described immediately below, involved substantial assets or allegations of sexual abuse against either spouse.

On March 29, 2001, M.W. filed for divorce from S.W., a doctor. The parties had substantial assets. Also, the couple had three minor daughters. Custody and placement of the daughters was at issue. Before the divorce, M.W. had concerns that S.W. was abusing the oldest daughter. She raised allegations of sexual abuse against S.W. during the divorce proceedings.

Initially, M.W. retained Attorney A. While represented by Attorney A, M.W. stipulated to the appointment of a psychologist to undertake appropriate psychological

testing for purposes of evaluating placement of the children. M.W. was aware that S.W. had some previous involvement and contact with an associate of the psychologist prior to entering the stipulation, but agreed that if information would not be shared between the psychologist and the associate, the psychologist could serve.

On September 18, 2001, Attorney A informed S.W.'s lawyer that M.W. believed S.W. was abusing the oldest daughter, based upon suspicions of a counselor. The counselor reported her suspicion despite the daughter's denial that abuse occurred. The County Department of Human Services undertook an investigation and closed the case without further action. M.W. took the oldest daughter to another counselor, who reported that she did not believe sexual abuse had occurred. The court-appointed psychologist interviewed M.W., S.W., and the three children, and recommended joint custody and 50/50 placement of the children with the parties.

By early 2002, the parties were aware that Human Services had closed the investigation of sexual abuse allegations, and that the psychologist had recommended 50/50 placement. In addition, S.W. moved the court for a reduction in his support payments.

In January and February 2002, M.W. terminated Attorney A's representation, and contacted Attorney Kinney. M.W. agreed to pay Attorney Kinney \$150 per hour. In March 2002, Attorney Kinney began representing M.W. Although this divorce was more complex than others he had handled, and despite his limited knowledge and experience in divorce law, Attorney Kinney did not consult with an experienced divorce attorney regarding the issues involved in the case. Despite working on an hourly basis, he did not

send a bill to M.W. until February 24, 2003, over a month after he withdrew from the representation.

Throughout the time Attorney Kinney represented M.W., he continued to argue that S.W. was guilty of sexual abuse of the daughter, despite the facts that the daughter denied it, Human Services found no substantiation, and Attorney Kinney found no witness or expert who would substantiate the allegations. Furthermore, Attorney Kinney continued to pursue disqualification of the psychologist despite M.W.'s stipulation made with knowledge of the contact between S.W. and the associate and without any evidence that the information had been shared between the psychologist and the associate.

In April 2002, Attorney Kinney filed a motion to remove the psychologist. The court commissioner heard the motion on May 21, 2002. He denied the motion to remove the psychologist, made detailed findings of fact, and concluded:

The court believes there was a meeting with the attorneys, the Guardian ad Litem and the parties pertaining to this potential conflict appointing [the psychologist] to this case. [M.W.] testified that she could not remember it occurring. Further, if there was such a concern, the issue could have been raised at the time in early fall of 2001, when [M.W.] testified that she learned that [the associate] was employed at the same firm [the psychologist] owns. The timing of this objection appears to closely coincide with the realization that the Guardian ad Litem and [the psychologist] were not going to agree with [M.W.'s] perceptions on the sexual abuse issue and award substantial periods of physical placement of the children with [S.W.].

On August 12, 2002, the psychologist completed a report that concluded there was no sexual abuse and recommended equal placement of the children. On September 26, 2002, the Guardian ad Litem sent a copy to Attorney Kinney. Attorney Kinney filed motions to compel a physical and mental examination of S.W. and to remove the

psychologist. Attorney Kinney still had no factual basis to seek a physical and mental examination of S.W.

On November 6, 2002, Attorney Kinney filed a brief in support of the motion to remove the psychologist. The brief made unsubstantiated allegations, argued facts contrary to the commissioner's findings, and conceded "initial legal research fails to disclose any Wisconsin published judicial decisions or any local [circuit court] rules that directly and unequivocally govern the key conflict of interest issue."

On November 12, 2002, the Court heard and denied the motion. The Judge found that M.W. had agreed to the appointment, and was therefore bound. The Judge further stated:

Those are all weight problems, those are all credibility issues for the Court to determine somewhere down the road, but we are spinning our wheels, and, quite frankly, we are wasting time and we are wasting money for both of these parties by engaging in this at this juncture, and I don't disagree with you, Mr. Kinney, but at times it is – its necessary that I – I phrase it different than you do, because I am probably not as eloquent as you are – but for the Court to do the right thing in a given situation, and that's equity, do what's right under the circumstances. I am going to do what's right, and I am going to deny your motion, because I don't find any legal basis for it. I don't find any basis in fact even on your – on your explanation and offer of proof as to the witnesses.

On December 17, 2002, Attorney Kinney moved to withdraw because M.W. had terminated his services. On January 2, 2003, the court granted the motion.

On January 10, 2003, M.W. retained Attorney C. On January 14, 2003, Attorney C faxed a letter to Attorney Kinney requesting that he provide all original documents included within the file for retrieval. That same day, Attorney Kinney responded by fax, questioning Attorney C's right to receive originals from the file, and arguing that he had not been paid for his representation.

During the next several days, Attorney C continued to seek the files and Attorney Kinney continued to object. He further sought to impose a condition that Attorney C agree to hold the files as a bailee on Attorney Kinney's behalf. Attorney C filed a motion with the court to compel release of the files. On January 24, 2003, before the court, Attorney Kinney asserted a retaining lien on the grounds that M.W. had not paid for his services. At that point, Attorney Kinney had neither billed M.W. nor prepared a billing statement. The court found that the files belonged to M.W. and ordered Attorney Kinney to produce them.

On February 24, 2003, Attorney Kinney petitioned the Court of Appeals to review the matter of the retaining lien. He cited no cases from divorce litigation supporting his position, but did cite Ethics Opinion E-94-4, which states, "The so-called 'retaining lien' has not been expressly recognized in Wisconsin and, therefore, any claim by a lawyer that there is, under Wisconsin Law a general right to retain client papers to secure payment of a fee is tenuous at best." On March 6, 2003, the Court of Appeals dismissed the petition for leave to appeal as a matter of right.

On March 7, 2003, Attorney Kinney filed in Circuit Court a notice of a charging lien upon property obtained by M.W. in the divorce proceeding. On March 26, Attorney C filed a notice of objection to the charging lien and moved for costs pursuant to Section 814.025, Wis. Stats. Attorney C's brief in support argued that Attorney Kinney's request for a charging lien was frivolous based upon the holding in Stasey v. Stasey, 168 Wis. 2d 37, 483 N.W.2d 221 (Wis. 1992), and the fact that Attorney Kinney had failed to bill M.W. until after the time his representation was terminated. The Court found Attorney

Kinney's request for a charging lien to be frivolous and awarded fees and costs in the amount of \$1,545.

On March 20, 2003, the parties signed a settlement agreement. In that agreement, M.W. agreed to make a contribution to S.W.'s attorney fees in the amount of \$20,000 due to Attorney Kinney's over-trial and frivolous prosecution. On March 27, 2003, the Judge signed an order that incorporated the settlement agreement.

In a separate matter, Attorney Kinney represented R.E. in a divorce case. The matter was resolved in the fall of 2000. On January 5, 2001, Attorney Kinney drafted a Qualified Domestic Relations Order (QDRO) for the purpose of obtaining pension benefits for R.E. On March 1, 2001, the plan administrator wrote to Attorney Kinney indicating that the QDRO did not qualify and explaining what changes needed to be made. As of February 2005, Attorney Kinney had not completed an appropriate QDRO.

The District Committee investigated and reported its findings on March 25, 2005. The Director agrees with Committee findings that:

- 1) By agreeing to represent M.W. in a complicated divorce despite his limited knowledge and experience in divorce law; by failing to closely examine the sexual abuse issue; by pursuing allegations of sexual abuse, disqualification of the court-appointed psychologist, and retaining and charging liens without a basis in fact or law; and by failing to consult with an experienced divorce attorney, Attorney Kinney violated Supreme Court Rule 20:1.1.

- 2) By pursuing sexual abuse allegations against S.W. and the disqualification of the court-appointed psychologist when he knew there was not a legal or factual basis, Attorney Kinney violated Supreme Court Rule 20:3.1(a)(1).
- 3) By failing to promptly deliver M.W.'s file to Attorney C and by interposing unwarranted objections and conditions on delivery, Attorney Kinney violated Supreme Court Rule 20:1.16(d).
- 4) By asserting a retaining lien against M.W.'s file, and by asserting a charging lien against proceeds of M.W.'s divorce proceeding when he knew these assertions were unwarranted under existing law, Attorney Kinney violated Supreme Court Rule 20:3.1(a)(1).
- 5) By failing to file a proper Qualified Domestic Relations Order for R.E. for a period of over four years, Attorney Kinney violated Supreme Court Rule 20:1.3.

In accordance with SCR 22.09(3), Attorney Kinney is hereby publicly reprimanded. Attorney Kinney has agreed that he will not withdraw his petition to voluntarily surrender his license, dated July 22, 2005.

Dated this 24th day of October, 2005.

SUPREME COURT OF WISCONSIN

/s/ John A. Fiorenza
John A. Fiorenza, Referee